85-1728

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD LEE FESLER, JR. and
DEBORAH RUTH FESLER,

Petitioners

versus

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an indictment which merely alleges that a defendant, by act or omission, engaged in conduct that caused serious bodily injury to a child, *without any allegation of what such act or omission was*, should be dismissed upon timely pretrial motion upon the grounds that same fails to inform the defendant of the nature and cause of the accusation against him.

2. Whether a defendant may be convicted for one grossly negligent act of causing a scalding of his child *both* under the Federal Involuntary Manslaughter statute *and also* under the Assimilative Crimes Act, 18 U.S.C. 13, adopting Sec. 22.404 Tex. Pen. Code, for recklessly causing serious bodily injury to a child.

3. Whether in Federal criminal trials it is proper to instruct the jury that it may infer that the testimony of any absent witness *who could have been called* by the defendant but was not called, might have been unfavorable to the defendant, when all absent material witnesses were under the control or in the employ of the government.

4. Whether in federal criminal trials violation of the Federal Rules of Evidence effecting the substantial rights of the defendant are merely a matter within the discretion of the trial judge, as held by the Court of Appeals herein.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

NO. _____

RICHARD LEE FESLER, JR. and
DEBORAH RUTH FESLER,

Petitioners

versus

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

The petitioners, Richard Lee Fesler, Jr. and Deborah Ruth Fesler, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals, Fifth Circuit, rendered in these proceedings on January 21, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, *U.S. v. Fesler*, 781 F.2d 384, appears at Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals, Fifth Circuit, was rendered on January 21, 1986. Petitioners duly filed a petition for rehearing in said Court on February 3, 1986, which was denied by order of said Court on February 20, 1986, which appears at Appendix B. Jurisdiction to review said judgment herein by writ of certiorari is conferred on This Court by 28 U.S.C.A. 1254 (1).

CONSTITUTION PROVISIONS, STATUTES AND RULES INVOLVED

Constitution of the United States, Amendment VI:

> "The accused shall enjoy the right to . . . be informed of the nature and cause of the accusation."

Constitution of the United States, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous, crime unless on a presentment or an indictment of a Grand Jury."
>
> "No person shall be . . . subject for the same offense to be twice be in jeopardy of life or limb."

18 U.S.C. 1112:

> (a) "Manslaughter is the unlawful killing of a human being without malice. It is of two

kinds . . . Involuntary - - In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death."

(b) "Within the special maritime and territorial jurisdiction of the United States."

18 U.S.C. 13:

"Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment."

Federal Rules of Evidence:

Scope

"These rules govern proceedings in the courts of the United States . . ."

STATEMENT OF FACTS

The undisputed evidence showed that on December 21, 1982, Petitioners' ten-month-old baby girl, Laurie, with burns on part of her body, was carried by Petitioner Richard Fesler into the emergency room at Darnell Hospital at Fort Hood, Texas, where Petitioners resided in government housing (R. III, p. 390). The medical records showed that Petitioners'

ten-month-old child, Laurie, was taken to the emergency room *immediately* after having been scalded on part of her body and that Laurie was flown to Brook Army Medical Center and died from complications, including pneumonia, seventeen days later (R. III, p. 390). Petitioner Deborah Fesler stated at the time of the event and testified at trial that she had bathed said ten-month-old, Laurie, and her 2½-year-old brother, left them at the far end of the tub in about three inches of water, stepped a few feet into an adjoining room to say a few words to Petitioner Richard Fesler, heard the water go on and Laurie start screaming, ran back into the bathroom, seeing Laurie hunched down under the spout with the water falling on the back of her neck. Physicians testified for the government that because there was a clear line of demarcation between the burned and unburned skin, it was their opinion that the child had been dipped into the hot water and held. Physicians and a physicist testified for the defendants that it was impossible for the child to have been dipped as the government contended and that the burning could only have occurred exactly as described by the mother.

The Federal offense of involuntary manslaughter *and* the Texas offense of serious bodily injury to a child under the theory of the Assimilative Crimes Act were submitted to the jury, and a verdict returned finding the Defendant *not guilty of any intentional injury* to said child but guilty of said involuntary manslaughter offense of failing to exercise due care and circumspection and of the purported Assimilative Crimes Act offense of recklessly causing serious bodily injury to said child (R. II, p. 64). Notwithstanding the fact that the jury acquitted the Defendants of any intentional injury of any person, the District Court sentenced Defendants to the maximum of ten (10) years imprisonment for the Texas offense of recklessly causing serious bodily injury to Laurie and the maximum of three (3) years confinement for the Federal involuntary manslaughter of Laurie, and ordered said sentences

to run concurrently (R. II, p. 43). The Court of Appeals vacated the involuntary manslaughter conviction for error in the charge but affirmed the causing of serious bodily injury to a child conviction under the Assimilative Crimes Act.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH A DECISION OF THIS COURT IN DISPARAGEMENT OF FEDERAL CONSTITUTIONAL RIGHTS THAT ARE CRITICAL TO EVERY ACCUSED IN CRIMINAL CASES.

A) The decision below holds that notwithstanding a timely motion to dismiss, an indictment need only allege that an accused person was guilty of *an* act or omission that resulted in *some unnamed* injury to another without any notice to the accused of *what* act or omission he committed, which holding conflicts with This Court's decision in *Russell v. U.S.*, 82 S.Ct. 1038.

The opinion below attempts to justify such total dearth of any notice to the defendant of what act or omission he is charged with committing on the theory that it is a verbatim copy of the Texas statute itself and that defendant failed to request a Bill of Particulars. In *Russell v. U.S.*, supra., This Court specifically contradicted each of said theories. This Court in said case stated that such an indictment enables a conviction to rest on one point and the affirmance of same to rest on another and to hold such lack of notice curable by a Bill of Particulars would violate the requirement of presentment of a Grand Jury, without which the constitution says "no person shall be held to answer".

Not only does the indictment herein totally fail to give to the Defendants *any* notice of what act or omission they were charged with having committed or to render it possible for the Trial Court to charge the jury as to what act or omission must be found to have been committed by the Defendant or to render possible for any appellate Court to determine whether the act or omission the Defendants allegedly committed was proved or whether the act or omission found by the jury could, in law, have constituted "recklessness" instead of simple negligence, but said indictment also patently fails to allege facts sufficient to support any plea of former jeopardy. It merely asserts Defendants committed *some* act or omission that resulted in *some* serious bodily injury. The allegation of the date merely means, in law, that it occurred within the period of limitations.

No one on earth can give any idea as to what act or omission was considered by the jury or grand jury to constitute recklessness. Was it failure to check the temperature of the hot water? Was it the mother leaving the children unattended for a moment? Was it failure to immediately call the ambulance instead of trying to cool the child with cool water? Was it failure to caution the 2½-year-old not to touch the knobs nor permit his little sister to do so? Was it one of a hundred other possible faults that some juror might have thought of, whether raised by the evidence or not?

B) The decision below upholding an instruction to the jury that it may infer that the testimony of *any* absent witness *who could have been called* by the defendant but was not called might have been unfavorable to him when all absent material witnesses were under control or in the employ of the government conflicts with the constitutional rights of confrontation and the presumption of innocence.

> The Court instructed the jury as follows: . . . . "If a potential witness *could have been called* by the Government *or by the Defendant* and neither side called him, then *you may infer that the testimony of the absent witness might have been unfavorable* to the Government or *to the Defendant or to both*" . . . .

Appellants specifically objected to said instruction upon the ground that said charge was prejudicial to the Defendant and that *such inference should only be made of said witnesses under the control of the respective party against whom such adverse inference is to be made* (R. III, p. 1002).

Warrant Officer Colon was a critical witness as to many relevant facts that occurred when Laurie was brought to the emergency room (R. III, p. 140-143). Pam Oglesby was a critical witness as to whether or not Deborah Fesler's story as to spanking Carl by reason of his running into the street was true or false (R. III, p. 853). Captain Virginia Hallinan was a critical witness as to the burns on the child and what transpired at Brooke Army Medical Center regarding the child and Defendants (R. III, p. 390). The evidence was undisputed that Warrant Officer Colon was, at the time of trial, an employee of the government, that Pam Oglesby was then married to a serviceman, that she and her husband had been flown from St. Louis to Waco for this trial by the government, that the prosecutor had conversed with her and then authorized her to fly back to St. Louis without calling her to the stand as a witness (R. III, p. 653-662), and that Virginia Hallinan was, at the time of trial, a captain in the U. S. Army (R. III, p. 661-662). The government failed to call any of the above as witnesses.

Said instruction, which specifically advised the jury that they had the right to infer that said witnesses' testimony

would have been adverse to Defendants' positions, regardless of whether Defendants had any special relation to them, permits hearsay inferences against Appellants and violates the presumption of innocence. Not one solitary person was shown to have been under either Appellant's control who was not actually called as a witness.

If this instruction is permitted to stand, then every prosecutor will request same in every criminal case in federal courts in order to fill any gaps in the prosecution's case through hearsay inferences against the accused in violation of the presumption of innocence.

II.

The decision below holds that even though an act or omission is punishable by an enactment of Congress, the same act can be punished under a State statute by reason of the Assimilative Crimes Act simply if the State and Federal statutes do not have the exact elements, which holding conflicts with the decision of This Court in *Williams v. U.S.*, 66 S.Ct. 778, and a decision of another Court of Appeals in *U.S. v. Big Crow*, 523 F.2d 955, and said holding decides an important question of application of State laws to Federal enclaves which should be clearly settled by This Court.

By express statute as well as peremptory case law, *any act or omission that is punishable by any enactment of Congress* cannot be punished under the Assimilative Crimes Act, *Williams v. U.S.*, supra. *Issues pertaining to the law of jeopardy, such as exactitude of elements of offenses, have no bearing whatsoever on this principle, Williams v. U.S.*, supra. *The panel opinion decides the ACA applies by erroneously applying the Blockburger Rule, which has no application whatsoever.* Such principle is clearly set forth in *U.S. v. Big Crow* supra., as follows:

> . . . . "Whoever . . . is guilty of any *act or omission* which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of a State . . . . Under *18 U.S.C. Sec. 13*, the government can resort to state law only if no act of Congress makes a defendant's conduct punishable . . . . The fact that an assault actually results in serious bodily injury does not preclude use of Sec. 113 (3) *even though that result is not an essential element of that offense.* If the Government believes that the maximum punishment under Sec. 113 is inadequate to some aggravated assaults, the remedy lies in Congress, not in substitution at the prosecutor's discretion of the state law for federal law." (emph. added)

Carefully bear in mind that the Government presented only one set of facts that it contended was sufficient to circumstantially prove that the Defendants fatally injured Laurie Fesler. Its sole theory was that Defendants deliberately dipped the child in scalding water. The fact that these Defendants were indicted by the Government of the federal offense of murder and convicted upon the Court's Charge upon the federal law of involuntary manslaughter is an unanswerable admission by the Government and an adjudication by the District Court that the acts or omissions committed or omitted by the Defendants were *punishable by an enactment of Congress*.

We respectfully submit that in the long judicial history of this country, there has never before been a contention made in any adjudicated case that a Defendant, whom the Government contends killed another on federal property, rendering him subject to prosecution for murder or manslaughter,

should be subject to any application of a State statute under the Assimilative Crimes Act *for the same act or omission*. The existence of the federal crimes of murder and manslaughter positively precludes application of *18 U.S.C. Sec. 13* by the express terms of said statute.

III.

The decision below that in Federal criminal trials a violation of the Federal Rules of Evidence is merely a matter within the discretion of the Trial Judge is a holding that will denigrate substantial rights of defendants and cause the Federal Rules of Evidence to mean nothing.

The opinion of the Court of Appeals disposes of many clearly prejudicial errors in admissions and exclusions in evidence simply by stating that a district court has broad discretion over the admissibility of evidence and may only be reversed for abuse of that discretion. It applied such standard of review by said generalized statement to the following:

A) The government proved Deborah Fesler gave away her baby crib a short time before the scalding of her baby in order to infer to the jury a pre-designed killing. The Trial Court refused to permit testimony by Deborah Fesler that she gave the crib to a pregnant, single parent of three in her church who had no money for a crib, and Deborah Fesler started using her son's bed with side rails on it for her baby and had no pressing need for it.

B) Evidence that Deborah Fesler had been a conscientious objector in the service, showing her to believe that she should never hurt anyone, was excluded though the critical issue was whether she would have had the state of mind characterized in law of conscious indifference or recklessness.

C) Over objection, proof was made that a Court order was issued since the alleged scalding which required Defendants' son, Carl, to be turned over to the Department of Human Resources.

D) Objection was overruled to the prosecutor's statement, in question form, "Isn't it a fact, Pastor Proffitt, that you said that the bruising and scalding were neglect?".

E) Over objection, a social worker was permitted to testify that it was her opinion that the Defendants' explanation of the scalding was inconsistent with the facts.

F) Over objection, evidence was admitted that the child was found during autopsy to have had an *old* hematoma of *unknown origin* without any evidence that such was caused through criminal conduct or by either defendant.

G) Over objection, proof was made that Defendants' 2½-year-old son, about a month after the alleged offense, covered his eyes and would not look at his parents when they came in a room and that when they gave him a coloring book, he colored out the eyes and scratched out the hands without any evidence as to the meaning or reasons of such.

H) Defendants' motion to instruct the jury not to consider the prosecutor's statement to the Court in the presence of the jury that defense counsel recalled witnesses when he was uncomfortable with some aspect of their testimony was overruled.

CONCLUSION

For said reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals, Fifth Circuit, and Petitioners accordingly so pray.

Respectfully submitted:

W. V. Dunnam, Jr.

W. V. Dunnam, Jr. per C.O.E.

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ATTORNEY FOR PETITIONERS

CERTIFICATE

I hereby certify that 3 true copies of the foregoing Petition for Writ of Certiorari have been duly mailed to counsel for the United States of America, Mr. Michael Hardy, Assistant U. S. Attorney, 655 E. Durango Blvd., Suite G-13, San Antonio, Texas 78206, and Solicitor General of the United States, Department of Justice, Washington, D. C. 20530, this 18th day of April, A. D. 1986.

W. V. Dunnam, Jr. per C.O.B.

W. V. Dunnam, Jr.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1227

U.S. COURT OF APPEALS
FIFTH CIRCUIT
FILED
FEB 20 1986
GILBERT F. GANUCHEAU
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD LEE FESLER, JR. and
DEBORAH RUTH FESLER,

Defendants-Appellants.

Appeal from the United States District Court for the
Western District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 01/21/86, 5 Cir., 198_, _____F.2d____)

(February 20, 1986)

Before THORNBERRY, RUBIN and JOLLY, Circuit Judges

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appe..ate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

E. Grady Jolly

United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

REHG-8

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RICHARD LEE FESLER, JR. and DEBORAH RUTH FESLER,
Defendants-Appellants.

No. 85-1227

OPINION

Filed January 21, 1986

Before: Homer Thornberry, Alvin B. Rubin and E. Grady Jolly, Circuit Judges.

Opinion by Judge E. Grady Jolly

Appeals from the United States District Court for the Western District of Texas
Walter S. Smith, Jr., District Judge, Presiding

SUMMARY

Criminal Procedure

Appeal from convictions. Affirmed in part, vacated in part and remanded.

Laurie Fesler, defendants infant daughter, died from scalding. Her brother was beaten in the face. Defendants were convicted of involuntary manslaughter in violation of 18 U.S.C. § 1112 and child abuse in violation of Texas Penal Code Ann § 22.04 made applicable through 18 U.S.C. § 13 (the Assimilative Crimes Act (ACA) because the crime was committed on a federal enclave in Texas.

[1] Richard Fesler seems to contend that because he did not admit to Laurie's scalding and because the government adduced no

eyewitness to the act, there was no evidence to connect him with the scalding. This argument ignores the circumstantial evidence which was sufficient for the jury to draw the inference that Richard was guilty of Laurie's murder and of causing her serious bodily injury. [2] This argument also ignores the fact that the indictment charges him with aiding and abetting in the scalding. The evidence, therefore, need not show it was Richard who committed the actual act of scalding so long as he aided and abetted his wife, Deborah, in the acts charged.

[3] The acquittal on the conspiracy count does not collaterally estop a conviction for aiding and abetting because collateral estoppel does not apply to the inconsistency of a verdict returned in a single trial and conspiracy and aiding and abetting are entirely separate crimes.

[4] While ACA only permits federal prosecution for those acts which are not already made penal by an act of Congress, the precise act made penal under federal law must be penal under state law before prosecution under the ACA is barred. [5] Because Congress has not covered the precise acts of child abuse covered by Texas state law, the ACA was properly invoked and applied.

[6] Since the indictments specified the date and place of the offense, adequately tracked the statutory language, alleged the elements of the statute, and since the Feslers were made fully aware of the charge in this case, they had an adequate opportunity to prepare and present their defense and are protected from double jeopardy. Thus, the indictments were sufficient.

[7] Because the thirty-day period of the Speedy Trial Act begins as of the date of the defendant's first appearance through counsel, not as of the date of either the indictment or superseding indictment, the Act was not violated. The Feslers first appeared in court about October 19, 1984 and the trial was not until January 29, 1985.

[8] The court's failure to instruct the jury on the meaning of the statutory term "due caution and circumspection" allowed the Feslers to be convicted upon a lesser showing of *mens rea* than the law permits in an involuntary manslaughter case. This constitutes reversible error.

[9] The Texas statute under which the Feslers were convicted clearly provides for a maximum term of ten years as was imposed. A sentence imposed within the statutory limits is generally not subject to appellate review. Therefore, the sentence cannot be challenged here.

OPINION

E. GRADY JOLLY, Circuit Judge:

In 1982, Laurie Fesler, the infant daughter of the appellants, died from scalding. Her two and one-half year old brother, Carl, was beaten in the face. Their parents, appellants Richard and Deborah Fesler were convicted for these acts, committed in violation of 18 U.S.C. § 1112 (involuntary manslaughter) and the Texas Penal Code Ann. § 22.04 (Texas child abuse statute) (Vernon Supp. 1985), made applicable in this case through 18 U.S.C. § 13 (the Assimilative Crimes Act) (ACA), because the crime was committed at Fort Hood, Texas, a federal enclave.[1] On appeal, the Feslers raise twenty-five objections to their convictions and sentencing, most of which we reject as meritless. However, because we find that the district court erred in instructing the jury on the involuntary manslaughter count, we vacate the Feslers' convictions on count two and remand for further proceedings on that count.

I

A.

Many of the facts in this case were in sharp dispute at trial. Since, however, the jury returned guilty verdicts, we are required to review the evidence in the light most favorable to the prosecution. *See United States v. Bell*, 678 F.2d 547, 549 (5th Cir. 1982) (en

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[1]The Assimilative Crimes Act provides that a person who is guilty of an act or omission, not punishable by any enactment of Congress, committed within the special maritime or territorial jurisdiction of the United States (i.e. a federal enclave), that would be punishable if committed within the jurisdiction of the state, territory, possession or district in which the federal enclave is located, is subject to federal prosecution under the state law.

banc), *aff'd*, 462 U.S. 356 (1983). Applying this standard, we find that the following facts were adduced at trial.

Richard Fesler and his wife Deborah, the appellants, are the parents of Laurie (aged ten months at her death), and Carl (two-and-a-half at the time of the Laurie's death). The family lived at Fort Hood, Texas, where Richard was a sergeant in the Army. The evidence showed that in the fall of 1982, Deborah Fesler told her neighbor Vicky Smith that she had been having problems disciplining Carl. On October 12, Smith noticed "awful looking" marks on the boy. Following a child abuse referral from the Department of Human Resources (DHR), a social worker examined Carl, saw bruises on his legs, and photographed them. Deborah told the social worker that the bruises could have come from a spanking since both parents used a dog leash when punishing Carl. Deborah also spoke of her husband's short temper. In November, the Feslers completed DHR-required professional counseling sessions on how to properly discipline their children.

On December 21, Richard Fesler took Laurie to the emergency room of Fort Hood's Darnall Army Community Hospital. Second-degree burns covered approximately forty percent of the infant's body. Laurie was treated by Dr. David Strauss, a senior resident, who was Board-certified in emergency cases. The characteristics and distribution of Laurie's burns and the history supplied by Richard Fesler prompted Dr. Strauss immediately to suspect that Laurie's injuries were the result of a classic type of child abuse. Laurie's injuries were so serious that she was evacuated by helicopter the same day to the burn treatment facility at Brooke Army Medical Center at Ft. Sam Houston. Laurie died as a result of her injuries sixteen days later. Dr. Linda Norton, a Board-certified pathologist and expert in child abuse, performed the autopsy and concurred with Dr. Strauss' diagnosis of child abuse. The autopsy report stated that Laurie died of burns "sustained when she was deliberately dipped in scalding water."

The evidence showed that on the day of the scalding, before leaving the hospital to be with her seriously injured daughter, Deborah let out the water from the bathtub and straightened up the bathroom. She asked neighbor Louis Oglesby to baby-sit with Carl, but Oglesby refused and insisted instead on taking the boy to the emer-

gency room for treatment because Carl's face was puffy and because he had red marks on his neck, cheek, and forehead. To Oglesby, Carl looked as if he had been held by the neck and scratched with fingernails. Deborah told Oglesby that "Richard got mad" at Carl. She further said that her husband had asked Carl whether he turned on the hot water, and, when Carl answered "Yes," Richard hit the boy two or three times in the face with his closed fist before she intervened to stop the beating. Deborah, appearing calm, told Oglesby that she did not want Carl to be seen at the hospital because a social worker might investigate his bruises. Once at the hospital, Deborah asked the doctor no questions about Laurie's condition, treatment, or prognosis, inquiring only if her husband was flying to San Antonio with Laurie and, if so, whether he would be returning by helicopter the same day. Deborah told the social worker that she did not want to see Laurie before the infant was flown to San Antonio.

Dr. Strauss testified that Richard Fesler was not only calm but that he laughed inappropriately during their interview. Richard did not seem upset to the social worker either. Rather, he appeared less interested in his daughter's condition than in getting candy bars for a warrant officer who was in the emergency room. Richard did not remain long with his critically injured daughter.

Dr. Strauss further testified at trial that, in his opinion, the characteristics and distribution of Laurie's burns indicated child abuse. Dr. Norton, who performed Laurie's autopsy, agreed with Dr. Strauss. Dr. Norton testified at trial that in her opinion, Laurie died as a result of being deliberately dipped in scalding water.

The evidence showed that Richard later explained to Dr. Strauss, the social worker, and his commander that he had knocked Carl aside and out of the bathtub as he was snatching Laurie from the hot water. The morning after the scalding, Richard reported to his commander that he was watching television in the bedroom when he heard the water suddenly come on; the Feslers, however, had no television in their home at that time. According to Fesler's commanding officer, Fesler further told him that he ran into the bathroom when Laurie screamed, and that he saw his daughter standing with hot water streaming down her. Fesler also suggested that he

had assisted his wife in dousing Laurie with cold water and in wrapping the child in towels.

At trial, Fesler testified that he was reading the Farmer's Almanac when the scalding occurred, but that he recalled little or nothing from the time he went into the bathroom until he spoke with the warrant officer at the hospital. Nevertheless, he remembered walking into the bathroom, seeing his daughter under the faucet, asking Carl if he had turned on the hot water, and hearing Carl's affirmative reply. He said he had no recollection of whether he had hit his son.

Deborah testified that she had been giving Laurie and Carl a bath when she stepped out of the bathroom to speak with Richard in the bedroom. According to her, Laurie cried after Deborah had been out of the bathroom for just a moment and that when she reentered the bathroom, Laurie was under the faucet with water streaming down her body. Deborah steadfastly maintained that she picked Laurie up from the hot water and that her husband thereafter repeatedly hit Carl in the face.

B.

Richard and Deborah Fesler were indicted on October 19, 1984, charged with conspiracy to assault, maim, and/or murder their children, Laurie and Carl, in violation of 18 U.S.C. §§ 371, 113, 114, 1111 (count one), and the murder of Laurie in violation of 18 U.S.C. §§ 1111, 2 (count two). A superseding indictment added the charges of causing serious bodily injury to Laurie (count three) and bodily injury to Carl (count four), in violation of both 18 U.S.C. § 13 (the Assimilative Crimes Act (ACA), and Tex. Penal Code Ann. § 22.04 (Texas child abuse statute) (Vernon Supp. 1985).[2]

[2]Texas Penal Code section 22.04 provides:

> (a) A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or omission, engages in conduct that causes to a child who is 14 years of age or younger or to an individual who is 65 years of age or older:
>
> (1) serious bodily injury;
>
> (2) serious physical or mental deficiency or impairment;

The district court granted the Feslers' motions for judgment of acquittal on counts one (conspiracy) and two (murder) except for the lesser-included offense of involuntary manslaughter on count two. The jury found the Feslers guilty of involuntary manslaughter (count two), recklessly causing serious bodily injury to Laurie (count three), and recklessly causing bodily injury to Carl (count four). Both parents received a ten-year sentence on count three (abuse of Laurie), a concurrent three-year prison term on count two (manslaughter), and five years supervised probation on count four (abuse of Carl). As a special condition of probation, the Feslers were required to undergo therapy for child abuse. The Feslers filed timely notices of appeal, challenging only their convictions on counts two and three.

II

On appeal, Richard Fesler has raised twenty-five objections to his conviction and Deborah Fesler has raised twenty-four of the same twenty-five objections. Almost half of these issues are meritless and are summarily dismissed.[3] The remaining issues can be

---

(3) disfigurement or deformity;

(4) bodily injury.

(b) An offense under Subsection (a)(1), (2), or (3) of this section is a felony of the first degree when the conduct is committed in intentionally or knowingly. When the conduct is engaged in recklessly it shall be a felony of the third degree.

[3]The Feslers contend that the district court erred in admitting the following into evidence: Laura's autopsy report; previous out of court statements by the Feslers' pastor who stated that he thought the bruising and scalding of the Fesler children was the result of neglect; testimony showing that Carl had previously been taken from his parents; testimony that Carl would not look at his parents after Laurie's death and colored out the eyes and scratched out the hands of characters in a coloring book; and opinion testimony of a social worker that the Feslers explanation of the scalding was inconsistent with the facts. The Feslers' also contend that the district court committed reversible error by excluding Deborah Fesler's proposed testimony that Richard was of unsound mind at the time that he slapped Carl, that she was a conscientious objector, and that she gave away Laurie's crib for charitable reasons. Finally, the Feslers contend that the district court erred in not striking from the record the prosecutor's objection to the defense counsel's repeated recalling of wit-

grouped into six distinct categories. First, Richard Fesler contends that the record contains no evidence that he knew that Laurie was in the bathtub or that he aided or encouraged his wife in leaving his daughter in the bathtub. Second, the Feslers contend that they cannot be tried, convicted, and sentenced under both federal law and state law on the same acts through application of the ACA. Next, the Feslers contend that the indictment was unconstitutionally vague and hence invalid. Fourth, the Feslers contend that the district court committed reversible error by beginning trial before thirty days had elapsed from the return of the superseding indictment in violation of the Speedy Trial Act. Fifth, the Feslers contend that the district court improperly instructed the jury on the federal involuntary manslaughter count. Finally, the Feslers contend that their ten-year sentence on the charge of causing serious bodily injury to Laurie violates the cruel and unusual clause of the eighth amendment.

III

nesses; limiting closing arguments to 22.5 minutes for each defendant (45 minutes total); instructing the jury that it was permissible to draw inferences against either the government or the Feslers for failure to call potential witnesses; and failing to instruct the jury on the Fesler's "alibi" defense.

Each of these contentions lack any merit. A district court has broad discretion over the admissibility of evidence and may only be reversed for an abuse of that discretion. *Petty v. Ideco*, 761 F.2d 1146, 1150-51 (5th Cir. 1985). We find that the district court did not abuse its discretion in its rulings on these matters. Using the same standard of review, we find no error in the district court's refusal to strike the prosecutor's statements from the record, especially since the district court repeatedly instructed the jury that the statements of counsel were not to be considered as evidence. Similarly, the length of time afforded counsel for closing arguments is left to the discretion of the district court. *United States v. Bernes*, 602 F.2d 716, 722 (5th Cir. 1979). In this case 45 minutes for the defense was not an abuse of discretion. Finally, a district court's instructions to a jury may only be reversed when the instructions inaccurately reflect the issues and the law pertaining to the case. *United States v. Schmitt*, 748 F.2d 249, 253 (5th Cir. 1984), *cert. denied*, 195 S.Ct. 2333 (1985). In this case, the court's statement that the jury was allowed to draw adverse inferences against either party was not only not prejudicial, it was correct. In addition, the court instructed the jury to consider the Feslers' affirmative defense, which is identical to the Feslers' request that the jury be instructed as to the Feslers' alibi. Thus, we find no reversible error in any of these contentions.

A.

Richard Fesler challenges his conviction on counts two and three,[4] contending that the record contains no evidence that he knew that Laurie was in the bathtub or that he aided or encouraged his wife in leaving his daughter in the bathtub. In addition, Richard Fesler argues that because the district court found that there was insufficient evidence to establish a conspiracy between Richard and Deborah, and granted a judgment of acquittal on that count, the court was collaterally estopped from instructing the jury on the law of aiding and abetting, with respect to the remaining counts charging the substantive offenses.

[1] We disagree with each of these contentions. Richard's contention seems to be that because he did not admit to Laurie's scalding and because the government adduced no eyewitness to the act, there is no evidence to connect him with the act of scalding. This argument ignores the circumstantial evidence which was sufficient for the jury to draw the inference that Richard was guilty as charged in counts two and three. The jury was presented testimony that the day after Laurie died, Richard admitted to a neighbor that he had helped place Laurie in the tub. The evidence also showed that Richard told conflicting stories to others as to what he was doing when Laurie was scalded. Moreover, Richard and Deborah materially contradicted each other in their explanations of the event. Finally, in contrast to the Feslers' explanations, Dr. Norton testified that based on her observations of the burn marks on the body, Laurie had deliberately been dipped. The jury was fully entitled to discredit Richard's story. Furthermore, in assessing the evidence, the jury was entitled to take into account evidence showing Richard's short temper and Richard's complete lack of concern over Laurie's condition. The pattern of child abuse in the Fesler home was competent evidence under Federal Rule of Evidence 404(b), showing intent and the absence of accident in the Fesler home.

[2] Richard's argument that the evidence was insufficient to convict him tends to ignore that the indictment charges him with aiding and abetting in the scalding of Laurie. The evidence, therefore,

[4] As we have earlier indicated, Richard and Deborah Fesler do not appeal their convictions on count 4, the child abuse of their son Carl.

need not show that it was Richard who committed the actual act of scalding so long as the evidence supports that he aided and abetted Deborah in the acts charged. The evidence was sufficient for the jury to draw this inference beyond a reasonable doubt.

[3] Finally, Richard's assertion that the trial court's acquittal on the conspiracy count collaterally estops a conviction for aiding and abetting misapplies the doctrine of collateral estoppel. Collateral estoppel does not apply to the inconsistency of a verdict returned in a single trial. Rather, the doctrine applies in situations where the verdict of one jury precludes a subsequent jury from returning a verdict inconsistent with the earlier verdict. *United States v. Cauce*, 635 F.2d 441, 448 (5th Cir.), *cert. denied*, 454 U.S. 831 (1981). In addition, Richard's argument necessarily assumes that conspiracy and aiding and abetting are the same and that it is inconsistent to acquit on conspiracy while allowing a conviction on aiding and abetting. This assumption is erroneous. Conspiracy and aiding and abetting are entirely separate crimes so that acquittal on one does not implicate the remaining charge. *United States v. Swaim*, 757 F.2d 1530, 1536 (5th Cir.), *cert. denied*, 106 S.Ct. 81 (1985). Thus, we find that the court was not, by the lack of evidence of conspiracy and the judgment of acquittal granted thereon by the court, collaterally estopped from charging the jury on the law of aiding and abetting.

B.

With respect to their daughter Laurie, the Feslers were convicted and sentenced under both 18 U.S.C. 1112 (involuntary manslaughter) of the federal criminal code and section 22.04 of the Texas Penal Code (Texas child abuse statute) which was held to be applicable by reason of the ACA, 18 U.S.C. 13. The Feslers contend that both the express language of the ACA and subsequent case law indicate that any act or omission that is punishable by an enactment of Congress cannot be punished under the ACA. The Feslers argue that the federal offense of involuntary manslaughter plainly demonstrates that the acts with which they were charged were punishable by a federal statute, precluding application of the ACA. For this reason, the Feslers argue that no judgment or sentence should be imposed against the appellants for violations of state law.

[4] Again, we disagree. The ACA is designed to fill the gaps in federal criminal law by ensuring that the law governing federal enclaves conforms with the law of the state in which those enclaves are located. *United States v. Prejean*, 494 F.2d 495, 496 (5th Cir. 1974). While the Feslers correctly contend that the ACA only permits federal prosecution for those acts which are not already made penal by an act of Congress, this court has held that the "precise act" made penal under federal law must be penal under state law before prosecution under the ACA is barred. *United States v. Brown*, 608 F.2d 551, 554 (5th Cir. 1979).

[5] Here the criminal acts charged are distinct. The Texas penal code states that the victim must be under 14 years old or under before all the elements of child abuse are satisfied. *Lang v. State*, 586 S.W.2d 532, 533 (Tex. Crim. App. 1979). There is no such requirement in the federal offense charged in this case. Moreover, death of a human being, essential to a federal involuntary manslaughter conviction, is not required in the state offense. 18 U.S.C. § 1112(b). It is important that the state statute seeks to punish a particular offense at which the federal statute is not aimed, child abuse. Here, the evidence, viewed most favorably to the government, as it must be, showed that the Feslers committed two separate offenses: first, the scalding of Laurie was a clear violation of the Texas statute, but not of the federal statute; second, only when Laurie died had the federal offense of manslaughter been committed. The statutes punish two separate acts: maiming of a child, and second, the death of a human being. Because Congress has not covered the precise acts of child abuse covered by Texas state law, the ACA was properly invoked and applied.

C.

The Feslers' third contention on appeal is that the indictment on count three of the superseding indictment was invalid for several reasons.[5] First, count three of the superseding indictment charges

[5]Count three of the indictment reads:

> That on or about December 21, 1982, at Fort Hood, Texas, within the special maritime and territorial jurisdiction of the United States and in the Western District of Texas, Defendants RICHARD LEE FESLER,

that the Feslers, by act or omission, intentionally engaged in conduct that caused serious bodily injury to their child, but does not specify what that act or omission was. The Feslers contend that this failure renders the indictment violative of the fifth and sixth amendments because it failed to provide the Feslers with sufficient notice of the charge. Second, the Feslers contend that count three violates the Feslers' right to be tried solely upon presentment of a grand jury because the charge alleges that the Feslers' acts or omissions caused harm to Laurie but failed to allege what duty of care, if any, was owed by the Feslers to their daughter Laurie. Thus, the Feslers argue that the charge fails to allege an offense under the Texas penal code so that the indictment and conviction are void. *Ronk v. State*, 544 S.W.2d 123, 125 (Tex. Crim. App. 1976). Finally, the Feslers argue that since the indictment charges "act or omission" in the disjunctive, the government must allege (1) an act, and (2) an omission. This argument, in effect, contends that because the indictment is written in the disjunctive, it means that the factual allegations must be alleged in the conjunctive. While we really do not understand this argument well enough to explicate it any more, we understand enough to know that it is frivolous and need not consider it any further.

[6] "[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974). Under federal law, an indictment tracking statutory language need not allege the means of committing the offense. *United States v. Bearden*, 423 F.2d 805, 810-11 (5th Cir.), *cert. denied*, 400 U.S. 836 (1970). Thus, the indictments in this case, which tracked the language of the statute, specified dates and places, and charged the elements of the offense, were sufficient, even though they did not specify the act or omission that

JR. AND DEBORAH RUTH FESLER intentionally and knowingly, by act or omission, did engage in conduct that caused serious bodily injury to a child who was younger than 14 years of age, to wit, Laurie Fesler, in violation of Title 18, United States Code, Sections 13 and 2 and Section 22.04 of the Texas Penal Code.

caused the injury to Laurie. Furthermore, the Feslers were aware that the charge against them in count three was that they were criminally responsible for Laurie's scalding under the Texas child abuse statute. This conclusion is substantiated by the Feslers' failure to request a bill of particulars clarifying or explaining the charges in the indictments. Since the indictments specified the date and place of the offense, adequately tracked the statutory language, alleged the elements of the statute and since the Feslers were made fully aware of the charges in this case, they had an adequate opportunity to prepare and present their defense and are protected from double jeopardy. Thus, the indictments were sufficient.

With respect to the contention that the indictment is not sufficient under Texas law, the Feslers misapprehend the applicable standard to be applied. Federal law, not state law, determines the sufficiency of an indictment under the ACA. *United States v. Webb*, 747 F.2d 278, 284 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 1222 (1985). As we have discussed, the indictments in this case satisfy the applicable federal standard.

D.

The Feslers contend that the district court violated the Speedy Trial Act and thus committed reversible error by beginning trial on the charges in the superseding indictment before thirty days had elapsed.[6] The Feslers were indicted in the superseding indictment on counts three and four on January 8, 1985. Trial was held on all four counts on January 29, 1985. The Feslers did not provide a written waiver of their statutory right to thirty days between the superseding indictment and trial.

The Supreme Court has held that the thirty-day period begins as of the date of the defendant's first appearance through counsel, not at the date of either the indictment or the superseding indictment.

[6]The Speedy Trial Act of 1974, as amended in 1979, 18 U.S.C. § 3161(c)(2) provides:

> Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed *pro se*.

In *United States v. Rojas-Contreras*, 106 S.Ct. 555 (1985) a federal grand jury returned a two-count indictment against the respondent on February 18, 1983. The indictment misstated the date of the respondent's previous arrest. Nonetheless, the respondent was arraigned on this indictment on February 18 and trial was set for April 19, 1985. On April 15, 1983 a grand jury returned a superseding indictment that was identical with the February 18th indictment except that the date of the respondent's previous arrest was corrected. The respondent was arraigned on the superseding indictment on April 18, 1983. Counsel for the respondent moved the district court for an additional thirty days to prepare for trial, contending that § 3161(c)(2) authorized the additional time. The district court denied the motion and the Ninth Circuit reversed. The Supreme Court reversed the Ninth Circuit, stating that "Congress did not intend that the 30-day trial preparation period begin to run from the date of filing of a superseding indictment." *Id.*

[7] Applying this holding to the instant case, we find that the Speedy Trial Act was not violated. The Feslers were first indicted on October 19, 1984, and first appeared in court on about that date, affording them more than thirty days to prepare their defense. As the Supreme Court has held, the date of the superseding indictment is not determinative of whether the Speedy Trial Act was violated. Thus, we find the Feslers' contention that the Speedy Trial Act was violated meritless.

E.

The Feslers next contend that the district court improperly instructed the jury on the federal involuntary manslaughter count because the court did not instruct the jury on the meaning of "due caution and circumspection." The entirety of the district court's instruction to the jury on this count was

> 'Manslaughter' is the unlawful killing of a human without malice. . . . In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution or circumspection, of a lawful act which might produce death.
>
> Therefore, you may find a Defendant guilty under Count Two only if you find beyond a reasonable doubt that he or

> she committed a lawful act without due caution or circumspection which produced the death of Laurie Fesler. If you do not so find, or if you have reasonable doubt thereof, you must acquit the Defendant of involuntary manslaughter and say by your verdict 'Not Guilty.'

The Feslers argue, "due care" means ordinary negligence and a *mens rea* of "gross negligence" is a necessary element in a federal involuntary manslaughter charge and that the court committed reversible error in not granting the Feslers' requested jury charge on this count.

"In reviewing the refusal of the district court to give a requested jury charge, we must examine the manner in which the jury was actually charged." *United States v. Smith*, 726 F.2d 183, 186 (5th Cir. 1984). An appellate court should reverse a district court for failing to adopt a defendant's proposed jury charge "only where the charge, considered as a whole, does not accurately reflect the issues and the law of the case." *United States v. Fowler*, 735 F.2d 823, 829 (5th Cir. 1984). A proper instruction on an involuntary manslaughter charge requires the jury to find that the defendant (1) act with gross negligence, meaning a wanton or reckless disregard for human life, and (2) have knowledge that his or her conduct was a threat to the life of another or knowledge of such circumstances as could reasonably have enabled the defendant to foresee the peril to which his or her act might subject another. *United States v. Tresvant*, 677 F.2d 1018, 1023 (4th Cir. 1982); *United States v. Schmidt*, 626 F.2d 616, 617 (8th Cir.), *cert. denied*, 449 U.S. 904 (1980).[7]

[8] In this case, the court's failure to instruct the jury on the meaning of the statutory term "due caution and circumspection" allowed the Feslers to be convicted upon a lesser showing of *mens rea* than the law permits in an involuntary manslaughter case. The government contends that the court twice instructed the jury on the law of recklessness and that these instructions remedied whatever

[7] *See also United States v. Keith*, 605 F.2d 462, 463 (9th Cir. 1979), where the Ninth Circuit held an indictment for involuntary manslaughter to be invalid because it failed to charge the defendant with gross negligence, even though the indictment tracked the statutory language and charged the defendant with acting without "due care and circumspection."

error may have occurred. It is true that the jury was instructed on the law of recklessness, but this instruction was limited to counts three and four. The only instruction that the court gave with respect to the manslaughter was the instruction we quoted above. In fact, the court carefully separated its instructions into the different counts so that the jury would know which instruction pertained to which count. Thus, the jury was never told that in order to find the Feslers guilty of involuntary manslaughter, the jury would have to find that the Feslers acted recklessly. The court's instruction on count two constituted prejudicial error and the conviction on count two must be vacated.

F.

Finally, the Feslers challenge their ten-year sentence on count three as violating the cruel and unusual clause of the eighth amendment. The Feslers' argument seems to be that the court and the jury absolved the Feslers of intentionally injuring their children.[8] The federal manslaughter statute provides a maximum of three years for such unintentional acts. Consequently, the court was somehow limited to the same three year maximum when imposing the sentence under count three, notwithstanding that the maximum sentence under the ACA-incorporated state statute was ten years.

[9] This convoluted argument is frivolous. The Texas statute under which the Feslers were convicted clearly provides for a maximum term of ten years. The standards for challenging a sentence imposed by a district court are both clear and stringent. A sentence imposed within the statutory limits is generally not subject to appellate review. *United States v. Tooker*, 747 F.2d 975, 978 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 2032 (1985), and that certainly is the case here.

[8]The court granted the Feslers' motion for acquittal on the murder count, except for the lesser included offense of involuntary manslaughter. On count three of causing serious bodily injury to Laurie, the court allowed the jury to find the Feslers guilty of causing such injury "intentionally or knowingly," "recklessly," or through "criminal negligence." The jury found the Feslers guilty of recklessly causing serious bodily injury to Laurie. Thus, the jury acquitted the Feslers of "intentionally or knowingly" causing serious bodily injury to a child but nonetheless, in finding recklessness, found the Feslers guilty of a felony of the third degree.

IV

We summarize our holding today. The Feslers' convictions and sentences on count two are vacated and that part of the case is remanded to the district court for further action; we affirm the Feslers' convictions and sentences imposed on count three.

AFFIRMED IN PART, VACATED IN PART and REMANDED.